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No. 80-1646

In the Supreme Court of the United States

OCTOBER TERM, 1980

GENERAL MOTORS CORPORATION, PETITIONER

v.

DIRECTOR OF THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, in enforcing a subpoena issued by the National Institute for Occupational Safety and Health to an employer for employee medical records in connection with a statutorily authorized investigation into the presence of toxic substances in the workplace, the court of appeals correctly determined that production of the records to NIOSH was not violative of the employees' constitutional right of privacy or barred by the physician-patient privilege under state law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 636 F. 2d 163. The opinion of the district court (Pet. App. 7a-15a) is reported at 459 F. Supp. 235.

JURISDICTION

The judgment of the court of appeals (Pet. App. 17a) was entered on December 30, 1980. The petition for a writ of certiorari was filed on March 30, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Institute for Occupational Safety and Health (NIOSH) was established by the Occupational Safety and Health Act of 1970, 29 U.S.C. 671. The Director of NIOSH is authorized to conduct various kinds of research into occupational safety and health matters. In

particular, following a written request by an employee representative, the Director "shall determine * * * whether any substance normally found in the place of employment has potentially toxic effects" upon the workers. 29 U.S.C. 669(a)(6). The Director is authorized to subpoena records in order to carry out these health hazard evaluations. 29 U.S.C. 669(b); see also 29 U.S.C. 657(b); 42 C.F.R. Part 85.

This case involves a health hazard investigation commenced in 1976 at petitioner's Hill Plant in Dayton, Ohio. The investigation was begun at the request of union representatives, who alleged that workers engaged in the plant's "wet rubber process" were suffering from rubber poisoning and other skin diseases. During the course of the investigation, NIOSH issued a subpoena duces tecum to petitioner for the production of the medical records of all employees involved in the wet rubber process. Each record included the results of the employee's pre-employment physical, annual precautionary examinations, and examinations required by the Occupational Safety and Health Act of 1970. Petitioner declined to comply with the subpoena unless individual employees authorized release of their records. A consent form was prepared by petitioner and circulated by company supervisors to employees whose medical records were covered by the subpoena. Of the 704 recipients, 490 employees failed to execute the consent form (Pet. App. 1a-2a, 8a; C.A. App. 65-66).

Petitioner subsequently filed this action in the United States District Court for the Southern District of Ohio, seeking a declaration that it was not required to produce to NIOSH the records of those employees who did not consent (Pet. App. 2a, 7a). After an evidentiary hearing, the district court found that "NIOSH maintains Health Hazard Evaluation records in locked cabinets and under reasonably

secure conditions," that "information [stored in a computer] regarding a specific employee would be difficult, if not impossible, to retrieve [by an unauthorized person]," and that "[n]o evidence was presented of any breach of security" (*id.* at 10a). In light of those findings, the court held that petitioner must produce the medical records of its Hill Plant employees regardless of their consent (*id.* at 13a-14a). However, apparently relying on the physician-patient privilege recognized by Ohio law, the court allowed petitioner to delete the names and addresses from the medical records of employees who had not given their consent (*id.* at 14a, 15a), and ruled that "[a]n employee is entitled to be heard in a due process hearing to determine whether or not identified records pertaining to him may be examined without his consent" (*id.* at 15a).

On cross-appeals, the court of appeals reversed in pertinent part and set aside the portion of the judgment adverse to NIOSH (Pet. App. 1a-6a). The court first rejected petitioner's contention "that the Ohio [physician-patient] privilege statute is * * * the controlling principle of law here" (*id.* at 3a). Rather, concluding that in a federal-question case "the applicability of a privilege must * * * be ascertained by reference to * * * [federal law]" (*id.* at 4a), the court declined to "expand the scope of the 'federal common law' " to establish a physician-patient privilege that historically "[t]he common law did not recognize" (*ibid.*).

In addition, relying on this Court's decision in *Whalen* v. *Roe*, 429 U.S. 589 (1977), the court of appeals held that full enforcement of the subpoena to require production of the requested records to NIOSH would not violate any constitutional right of privacy of the employees (Pet. App. 5a). The court specifically noted that "in the absence of individual identification, [NIOSH's] performance of its statutory duties would be hampered. It would be impossible for [NIOSH] investigators * * * [adequately to conduct the

health hazard evaluation if the] medical records * * * were anonymous" (*id.* at 4a). Finally, having "in mind" NIOSH's assurances that "there will be no public disclosure of the medical information pertaining to individual * * * employees" (*id.* at 6a), the court remanded the case to the district court "for formulation and implementation of security provisions that will ensure proper disposition of the subpoenaed records as outlined in this opinion" (*ibid.*).

ARGUMENT

Without contesting either the statutory authority of NIOSH to issue the subpoena in this case or the validity of the subpoena under traditional principles of administrative law, petitioner argues that production of the requested records to NIOSH is barred by the employees' constitutional right of privacy and the Ohio physician-patient privilege. By way of remedy, petitioner seeks to delete the employees' names and addresses from the records and to provide the files to NIOSH in an anonymous form.

Petitioner's objections are misplaced. Contrary to its contention (Pet. 14-17), every court to consider the constitutional claim raised by petitioner has concluded, in accordance with the decision below (Pet. App. 5a), that the issue is governed by this Court's decision in *Whalen* v. *Roe*, 429 U.S. 589 (1977). See *United States* v. *Westinghouse Electric Corp.*, 638 F. 2d 570, 577-580 (3d Cir. 1980); *United States* v. *Allis-Chalmers Corp.*, 498 F. Supp. 1027, 1029-1031 (E.D. Wis. 1980); *E.I. du Pont de Nemours & Co.* v. *Finklea*, 442 F. Supp. 821, 824-826 (S.D. W. Va. 1977).

In *Whalen* v. *Roe, supra*, the Court unanimously rejected the argument that a constitutional right of privacy in medical records rendered invalid a New York statute requiring that prescription forms for certain drugs be provided to the State with identification of the prescribing physician, the dispensing pharmacy, the drug and dosage, and the patient (including name, address, and age). In

reversing the lower court, which had struck down the statute on the ground that it was not justified by a "compelling" state interest (*Roe* v. *Ingraham*, 403 F. Supp. 931, 937 (S.D.N.Y. 1975) (three-judge court)), the Court explained (429 U.S. at 602; footnote omitted; emphasis added):

> Even without public disclosure, it is, of course, true that private information must be disclosed to the authorized employees of the New York Department of Health. Such disclosures, however, are not significantly different from those that were required under the prior law. Nor are they meaningfully distinguishable from a host of other unpleasant invasions of privacy that are associated with many facets of health care. Unquestionably, some individuals' concern for their own privacy may lead them to avoid or to postpone needed medical attention. Nevertheless, *disclosures of private medical information* to doctors, to hospital personnel, to insurance companies, and *to public health agencies are often an essential part of modern medical practice* even when the disclosure may reflect unfavorably on the character of the patient. *Requiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy.*

The Court observed that the concept of a " 'zone of privacy' " in medical records subsumed "at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions" (429 U.S. at 598-600; footnotes omitted). The Court concluded that the New York statute did not infringe the first interest because the "statutory scheme, and its implementing administrative procedures, evidence a proper concern with, and protection of, the individual's interest in

privacy" (*id.* at 605) and there was "no support * * * for an assumption that the security provisions of the statute will be administered improperly" (*id.* at 601). Nor could "it be said that any individual has been deprived of the right to decide independently, with the advice of his physician, * * * [on proper medical care]" (*id.* at 603). Accordingly, the Court sustained the constitutionality of the New York statute. See also *Schachter* v. *Whalen,* 581 F. 2d 35 (2d Cir. 1978) (subpoena to doctor for patients' medical records, in connection with a state investigation of medical misconduct involving laetrile, was enforceable in light of protections against public disclosure).

Under *Whalen* v. *Roe,* the court below correctly enforced NIOSH's subpoena in this case. It is even less likely here than in *Whalen* v. *Roe* that production of the medical records to the government would discourage people from seeking necessary medical care. The purpose of the health hazard evaluation is to protect employees from unhealthful conditions in the workplace, and the evaluation of petitioner's plant was requested (as is generally true for health hazard evaluations) by the employees' representative (Pet. App. 1a); in contrast, the statute in *Whalen* v. *Roe* was designed to police the illicit use of dangerous drugs and was directed in large measure to criminal prosecution of drug offenders. Moreover, petitioner's employees generally have no choice to decline the medical examinations reflected in the requested records, since for the most part they are made mandatory by petitioner (C.A. App. 55-57). And a large number of people within petitioner's organization already have routine access to these medical records (Pet. 4 n.5; C.A. App. 61-63). Finally, NIOSH undertakes extensive security measures to protect the confidentiality of the materials obtained in connection with health hazard evaluations (Pet. App. 6a, 10a; see also 45 C.F.R. 5.71(a)), and there is

no basis to doubt the adequacy of those measures to prevent unauthorized public disclosure.[1]

Contrary to petitioner's argument (Pet. 7-12), the decision below does not conflict with the ruling of the Third Circuit in *United States* v. *Westinghouse Electric Corp., supra*. In that case, Westinghouse resisted a NIOSH subpoena principally on the ground that not all of the information in the medical files of its employees was relevant and that, "at most, NIOSH is entitled to examination of excerpts of those records which contain reports of * * * [specific tests]" (638 F. 2d at 575). The court of appeals rejected this claim and, relying on *Whalen* v. *Roe*, upheld the subpoena because "the interest in occupational safety and health * * * is substantial," there is "a reasonable need [by NIOSH] for the entire medical file of the employees as requested * * * in [its] complete form," the "information which the medical records contain is [not] of such a high degree of sensitivity that the intrusion could be considered severe or that the employees are likely to suffer any adverse effects from disclosure to NIOSH personnel," and " 'NIOSH's procedures of safekeeping the records and of removing the names and addresses of the individuals in its compilation of published data represent[] sufficiently adequate assurance of non-disclosure by' [NIOSH]" (638 F. 2d at 579-580). Thus, the Third Circuit held that the employees' medical records must be produced to NIOSH at least to the extent they contain "routine testing, such as X-rays, blood tests, pulmonary function tests, hearing and visual tests" (638 F. 2d at 579), and that the records provided to NIOSH

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[1] In addition, the court of appeals has remanded the case to the district court to formulate and implement such security provisions as may be necessary to ensure the proper disposition of the subpoenaed records (Pet. App. 6a). Any concerns petitioner might have about the adequacy of NIOSH's procedures can be raised before the district court, and thus further review of this aspect of the case would be premature at the present time.

could not be redacted to remove the identities of individual employees (638 F. 2d at 580). In these respects the decision of the Third Circuit in *Westinghouse* is in full accord with the decision of the court of appeals in the present case.[2]

It is true that the Third Circuit in *Westinghouse* further recognized that, while

> the public need prevailed over the claim that medical records in general were protected from discovery[,] * * * there may be information in a particular file which an employee may consider highly sensitive. * * * [T]he files are not limited to employment-related concerns but include records of the employees' personal consultations with the company physician and the physician's ministrations on a broad spectrum of health matters. * * * [E]mployees * * * may have raised with the company physician medical matters unrelated to their employment which they consider highly confidential.

638 F. 2d at 580-581. To accommodate this interest, the Third Circuit concluded that "the most appropriate procedure is to require NIOSH to give prior notice to the employees whose medical records it seeks to examine and to

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[2]Indeed, the Third Circuit in *Westinghouse* expressly rejected (638 F. 2d at 581) the decision of the district court in this case, which was later reversed by the court below, that disclosure could not be made to NIOSH except upon the employees' written consent. As the Third Circuit explained (*ibid.*):

> We believe that the requirement of securing written consent may impose too great an impediment to NIOSH's ability to carry out its statutory mandate. * * * [T]here may be * * * instances where the number of employees involved makes securing written consent difficult. Futhermore, there is the possibility that some employees will withhold consent either arbitrarily or because they do not understand the full nature of the investigation. Finally, some employees may withhold consent because they believe that is the course desired by their employer.

permit the employees to raise a personal claim of privacy, if they desire. * * * [Following that procedure,] the district court can balance the competing interests before ordering disclosure of the materials [to NIOSH] * * *" (638 F. 2d at 581-582).[3]

This aspect of *Westinghouse* is not in conflict with the decision below. Unlike Westinghouse, petitioner at no time distinguished among the types of information in the medical records or urged that greater protections were due certain portions of the records. Instead, petitioner has focused its arguments on the identification of employees in the subpoenaed records and has sought a blanket privilege against production of the records in the absence of written consent by each individual employee. Thus, the court of appeals in this case was never called upon to consider the distinct issue of the appropriateness of the procedures established by the Third Circuit to address the specific problem of "medical matters [of employees] unrelated to their employment which they consider highly confidential" (638 F. 2d at 581), and its decision here does not foreclose consideration of that issue in the future.[4]

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[3]Notwithstanding petitioner's suggestions (Pet. 9, 10 & n.14, 12), the Third Circuit did not require that the district court conduct a full due process hearing on any objections raised by the employees. On the contrary, the court of appeals specifically ordered "prompt disposition [of such claims] so that NIOSH's evaluation is not hampered" (638 F. 2d at 582). See also page 8 note 2, *supra*.

[4]The significance of the Third Circuit's directive is also unclear at this time. First, implementation of *Westinghouse* is now in progress, and it is uncertain how burdensome to NIOSH or beneficial to the employees those procedures will prove to be in practice. Second, the notice required of NIOSH by the Third Circuit could be given voluntarily by the employer whose records are subpoenaed; in that situation the *Westinghouse* procedures might be of little practical importance (and, as noted above, the Sixth Circuit's decision in the present case would not preclude employees from raising an individualized privacy interest in specific items in their files). For these reasons, we believe that the

Finally, contrary to petitioner's contention (Pet. 17-22), enforcement of the subpoena in this case is not barred by the Ohio physician-patient privilege. As the court below correctly held (Pet. App. 3a-4a), the applicability of a privilege in a federal-question case is governed under Fed. R. Evid. 501 by federal rather than state law. See, *e.g.*, *Heathman* v. *United States District Court*, 503 F. 2d 1032 (9th Cir. 1974); *United States* v. *Balistrieri*, 403 F. 2d 472 (7th Cir. 1968); *Colton* v. *United States*, 306 F. 2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); 2 J. Weinstein & M. Berger, *Weinstein's Evidence* 501-20 n.2, 501-33 to 501-34 (Cum. Supp. 1980).[5]

The physician-patient privilege was unknown to the common law. See *Whalen* v. *Roe*, *supra*, 429 U.S. at 602 n.28. Indeed, even the now-superseded version of the Federal Rules of Evidence promulgated by this Court[6] did not contain a physician-patient privilege. See Proposed Fed. R. Evid. 501-513, 56 F.R.D. 183, 230-261 (1973); 2 J. Weinstein & M. Berger, *supra*, at 501-16 to 501-17, 504-3, 504-8 to 504-9. In these circumstances, the court of appeals properly declined to "expand the scope of the 'federal common law' " (Pet. App. 4a). See also, *e.g.*, *FTC* v. *St. Regis Paper Co.*, 304 F. 2d 731 (7th Cir. 1962) (refusal to adopt federal accountant-client privilege that did not exist at common law but was created by state law).[7]

Court should await further developments in the lower courts before determining whether the issues presented by petitioner are otherwise appropriate for review.

[5]On the other hand, in civil actions where state law provides the substantive rule of decision, the state law of privilege is to be applied in federal court. Fed. R. Evid. 501. This provision is inapposite in federal-question cases such as the present one, and petitioner errs in relying (Pet. 19-20) on this doctrine to support its position here.

[6]See *Trammel* v. *United States*, 445 U.S. 40, 47 (1980).

[7]In any event, as petitioner acknowledges (Pet. 18), "federal law will of course override otherwise applicable state law where necessary to attain the ends sought by federal law." Here, application of Ohio law to

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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delete individual identifiers in the requested medical records would "hamper[]" NIOSH's "performance of its statutory duties" and make "impossible" the conduct of a proper health hazard evaluation (Pet. App. 4a). Accordingly, it would be entirely unwarranted to apply the Ohio physician-patient privilege to deny full enforcement of the subpoena in this case.

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